APPENDIX.

I.

There was no justification for the charge that the defense was that Myrtle Johnson had the syphilis.

The pleadings contain no mention of this subject. No affirmative defense of this nature was made in the defendant's answers. General denials were filed (R. 16-17).

In the opening statement for the defendant, it is stated that prior to the trip Myrtle Johnson had "applied herself assiduously to her work" which together with "the responsibilities of her business" had brought her to "a state of nervous irritation" and that she "was advised that she must rest a while; if not she would have a nervous breakdown," (R. 93) and concludes that the defendant believes that "the evidence will show that this condition is due entirely to her nervous breakdown and not to any blow that was received on the head at that time" (R. 95). The opening statement furnished no basis for the charge that Myrtle Johnson had the syphilis nor is there any "insinuation" that she was suffering from this disease.

Only one medical witness testified for the defendant—Dr. I. D. Siminson. He examined Myrtle Johnson when she arrived at Chicago and before she departed for Kansas City. He found no lump on her head and no broken skin (R. 359). Myrtle Johnson told him that prior to that time she had had an attack of double vision (R. 359). She complained of numbness in her hands and legs (R. 360). This doctor gave no treatment because he felt that no treatment he could give

would benefit her ailment, it appearing to him to be of a hysterical nature. (R. 360.) There is no charge here of syphilis or any insinuation that Myrtle Johnson had the disease. None of defendant's other witnesses testified to any facts or circumstances from which it could be inferred that the defendant was charging that Myrtle Johnson had syphilis.

In his argument to the jury defendant's attorney said:

> "Now, gentlemen of the jury, you never heard me say a word about any specific trouble whatever. I said nervous exhaustion, didn't I? Now I want to say to you now that I don't think she ever had a specific trouble at all, and I never have said that she did have. But let me tell you: I did have a right to show to the jury that her permanent condition was not due to the conditions as existed until she had been treated by Dr. Geraughty under a mistaken diagnosis of the case by himself." (R. 420.)*

He amplified this statement and pointed out that the hospital sheet, made by Doctor Sanders and introduced by the plantiffs, showed that a Wassermann test was made and that they commenced to give her iodide of potassium and that "that suggested to me that the doctors had made a wrong diagnosis of the case and had been giving this poor woman the wrong treatment." (R. 420.) He said that Myrtle Johnson went to Doctor Geraughty, that he "undertook to give her this treatment, which it is admitted is the same as salvarsan," and that "he too had made a wrong diagnosis" and that she begged him to withhold the treatment because she was suffering so much then. "What did it prove, gentlemen? That she had had any specific trouble? She would have responded to that treatment. But no, she didn't have it." (R. 421.) He thereupon argued that the giving of mercury and arsenic to one not suffering from the disease might

*Doctor Geraughty was the doctor who administered arsenic, iodides and mercury. (R. 120.) Prior to this statement defendant's attorney had said "Dr. Woody especially was the one that saw her before she ever had this mistaken treatment by Dr. Geraughty." (R. 417.)

have had some effect on her present condition (R. 421). This is but following out the opening argument for plaintiffs where it was said that Myrtle Johnson "made a mistake in choosing a doctor who gave her a treatment which resulted in arsenical poisoning," and that "she suffered the agonies of the damned in St. Margaret's hospital, where she had a rash from her head to her heels and where she lost her hair." (R. 416.) Instead of charging that she suffered from syphilis defendant's attorney argued the contrary. His argument does not substantiate the charge that the defense was syphilis.

But counsel assert that it was beyond the defendant's power to call a physician to testify as to her condition and that "the only thing left for it to do was to attempt to prove 'syphilis' by cross-examination of plaintiffs' lay witnesses and physicians" and some citations of the record are given to show this was done. (Respondents' brief in opposition to issuance of writs 15.) Plaintiffs' evidence will be briefly examined for the purpose of disproving this assertion. It is said the issue was first injected into the case by the cross examination of Imogene Johnson. Defendant's attorney asked her if Myrtle Johnson had any eruption of the skin about the time she was going to see Dr. Geraughty. The witness answered that she saw her in this condition after Myrtle Johnson had been to Dr. Geraughty. She described this condition of the skin as a rash which covered her body. (R. 155.) She was asked if it looked like a pimple that would not come to a head and answered that it looked more like a rash. (R. 156.) She was also asked if Myrtle Johnson, while at St. Margaret's, had ever told her whether they gave her hypodermic injections or whether they gave her medicines internally. (R. 157.) Up until this time in the trial there had been no mention of potassium iodide, syphilis or of "specific trouble" and no evidence that eruptions of the skin might be a symptom of syphilis or that

hypodermic injections or medicines internally were the ordinary treatment for syphilis. The evidence shows that this rash was not due to syphilis but to arsenical poisoning. (R. 416.) In the absence of evidence as to the symptoms and treatment of syphilis it can hardly be said that the defendant, by this cross examination was charging that Myrtle Johnson suffered from syphilis. It is well known that rash and eruptions of the skin result from many ailments in no way related to syphilis.* It is likewise a matter of common knowledge that "hypodermic injections and medicines internally" are given for many diseases and sicknesses and that the administration of such remedies is not necessarily an indication that the patient is syphilitic.

The first time the terms "potassium iodide," "blood tests" or "Wassermann" appeared in the record was when the plaintiffs' witness, Dr. Sanders, was examined by plaintiffs' attorney and when they offered in evidence Plaintiffs' Exhibits 4-A to 4-R. (R. 162.) Exhibit 4-K, (opposite R. 165) and Exhibits 4-L, 4-M, 4-N, 4-O, 4-P, 4-Q (between R. 196 and 197) show that Myrtle Johnson was given potassium iodide (R. 196) and Plaintiffs' Exhibit 4-C (R. 182) relates to a Wassermann test. These exhibits were not requested by the defendant. On the contrary objection was made to some of them. (R. 163.) Concerning Exhibit 4-C, the following appears in the record:

> "Mr. Marley (defendant's attorney): Q. Now this 4-C?
>
> Dr. Sanders: A. That was made by our pathologist, Dr. Richman.
>
> Q. You told him to make one out and report to you?
>
> A. I simply told him 'take her blood and make a Wassermann,' and that is the report there." (R. 163.)

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*Plaintiffs' witness, Doctor Sanders, who testified that he found some acne pimples on this woman, said these were the kind anyone was liable to have and that he found nothing indicating that Myrtle Johnson had syphilis (R. 190, 191). Plaintiffs' witness Geraughty testified that some people will have a rash from eating strawberries. (R. 325.)

While this exhibit relates to a Wassermann test, it is significant to note that defendant's attorney so framed his question, that the jury would not know that to be a fact. Plaintiff's witness however, supplied the information from plaintiff's exhibit when the natural answer to the question would have been a mere "yes." Counsel say iodide of potassium is "a well recognized treatment for syphilis." This is not the same as saying that it is a matter of common knowledge that the drug is used for that purpose.* However if such be the general understsanding, the plaintiffs cannot place the blame upon the defendant for introducing it into the trial because the giving of this treatment to Myrtle Johnson was brought out by the exhibits introduced by the plaintiffs.

The next quotation offered to support their charge is a part of an objection made by defendant's attorney to a question calling for an opinion from Dr. Sanders as to whether any further improvement would take place. (R. 173.) The question and the objection relate to a hypothetical question theretofore asked this same witness. (R. 165-167.) In his objection defendant's attorney contended that the witness' question should be based on certain additional facts not embodied in the hypothetical question but shown by the exhibits introduced by the plaintiffs, namely, blood tests and the treatment, iodide of potassium. (R. 173.) The objection was overruled, but it certainly cannot be said to be frivolous, nor can it be said that because defendant's attorney recited a portion of the medical history of the case, theretofore introduced in evidence by the plaintiffs, that the "defense was syphilis." It may be doubtful whether the mere mention, without explanation, of the terms "blood tests"** and "iodide of potassium" convey to the lay mind any inference that these things relate to syphilis, but if such an

*Doctor Sanders testified that it was for the absorption of any brain edema or possible clot or exudate, and that these might have come from this blow. R. 178. Cf. Doctor Connor R. 229 and Doctor Geraughty R. 324, 325.

**Exhibit 4C, R. 182, mention many blood tests, besides the Wassermann.

inference be conveyed the plaintiffs have no one to blame but themselves. They introduced the evidence relating thereto.

It is next charged that the defendant attempted to show syphilis because of the following:

> "Mr. Marley: Q. Now, I notice here you gave her iodide of potassium. Dr. Sanders: A. I did, yes, sir. Q. What is that for? A. That is for the absorption of any brain edema or any possible clot or exudate that may be there. Q. Well, would those all come from this blow, you think? A. It could. Q. But did it? A. I think it did; yes, sir. Q. That is your judgment? A. That is the theory upon which I treated the case; yes, sir. Q. I know, but couldn't there be another theory in that case? A. Yes, sir. I suppose there could be hundreds of theories; yes, sir. Q. That is just your opinion? A. That is just my opinion; yes, sir." (R. 178.)

Plaintiffs having introduced evidence that iodide of potassium was administered to Myrtle Johnson, the defendant was not guilty of improper conduct nor was it charging her with having syphilis because its attorney asked the doctor why the treatment was given. If the question can be said to contain a hidden meaning, it is defendant's attorney's doubt as to whether the possible clot or exudate came from a blow on the head and not as to whether or not potassium of iodide was a proper remedy for the purpose mentioned. Here again there is nothing conveying to the lay mind that the defense was syphilis. A few further questions, not relating to this subject were asked by defendant's attorney, when plaintiffs' attorney on re-direct examination asked this question:

> "Q. Just one question, Doctor. Among the records you brought here was a record with reference to blood test. I will ask you if in the ordinary routine of your hospital in cases anywhere similar to this you cause blood tests to be made?" (R. 179.)

Defendant's attorney on re-cross examination interrogated the witness on various blood tests and the part of the body from which fluid may be taken for Wassermann tests—the term "Wassermann test" having been introduced voluntarily by plaintiffs' witness—without having made any specific mention of syphilis. (R. 180.) When this examination was concluded, the following took place:

> "Mr. Wickersham (Plaintiffs' attorney): I just want to ask you one question on that. You take the blood tests, the Wassermann tests, such as you have described, in all cases where you take them at all, from the arm? A. As far as I am personally concerned, yes. Q. You are perfectly satisfied that that is a reliable test? A. For certain things; yes, sir. Mr. Wickersham: Yes. That is all.
>
> Mr. Marley: What are those certain things, Doctor? A. The test whether there is syphilis or not in an active form. Q. Whether or not there is syphilis in an active form; but supposing there is not in an active form, a luetic condition that is not active, then what? A. Well, when you have a luetic condition and there is still symptoms that are not accounted for by other things you go further; you go into the spinal column. Q. That is it exactly, and that is the one that goes in and finds out whether it is in the system or not, doesn't it? A. Not necessarily; no more than the blood test. Q. But you say the blood test is in the active form? A. Sometimes not even in the active form. I have taken blood tests that were positive and the spinal column tests that are negative. Mr. Marley: That is all." (R. 181.)

Here, for the first time, was the word "syphilis" introduced in the trial and we submit that any responsibility for its introduction must be borne by the plaintiffs and not by the defendant. But there is no charge here that Myrtle Johnson had this disease.

Dr. Richman was the next witness, and it is in connection with his examination that plaintiffs' counsel cite further arguments for their charge that the defense was syphilis. On direct examination of this witness plaintiffs' attorney elicited

the information that the blood test recorded on Plaintiffs' Exhibit 4-C was made by this doctor and that the result of the test was negative. He then asked this question and received the following answer:

> "Now, what does that mean, Doctor? A. It means that as far as the Wassermann test for syphilis that it showed negative. It showed that there was—well, what we call as a positive indicates syphilis and as a negative is not indicating syphilis. Q. Does that mean she didn't have it, according to your opinion, or not? A. No. —." (R. 182.)

The cross examination of this witness merely continued the subject theretofore introduced by plaintiffs' attorney and relates to the various Wassermann tests which are made. The examination is entirely impersonal and contains no charge that Myrtle Johnson had syphilis.

The plaintiffs next called Dr. Bahr, who testified on direct examination that he made a Wassermann test of Mrs. Johnson. Plaintiffs' attorney said:

> "Now, then, you tell us; what did you find?"

to which the witness replied:

> "I found a negative—a negative finding is such where a certain condition do not exist. The specific examination is made of the blood for—the request was for syphilis. We call it a Wassermann test through the fact that the first man who modified—." (R. 187.)

On cross examination he testified that he made the Kolman, the Wasserman-Noguchi modification, and Hecht-Weinberg tests. There is nothing in his cross examination to the effect that Myrtle Johnson had the syphilis or that the defendant was seeking to prove that fact.

Dr. Sanders re-called by the plaintiffs was examined at some length by plaintiffs' attorney as to syphilis and the various symptoms of this disease. (R. 189-191.) After naming each symptom he was asked by plaintiffs' attorney

whether Mrs. Johnson had such symptom. (R. 189-191.) Here was testimony directly associating the term syphilis with Myrtle Johnson—and it showed that she had none of the symptoms—but this evidence was introduced by the plaintiffs. Defendant's attorney asked only one question,—"Now, what you call paraplegia is paralysis from the hips down, isn't it." (R. 193.) It is argued, however, that because defendant's attorney objected to a question in regard to locomotor ataxia that he thereby "claimed that Mrs. Johnson had syphilis." The record on this is as follows:

> "Mr. Wickersham: I want to ask you if it differentiates this woman's case from anything like locomotor ataxia, this movement of the leg as she walks. Tell us about that, please. A. Locomotor ataxia is a disease caused as one of the late manifestations of syphilis, and is an entirely different walk from what this woman has. Q. In what way, so we understand it? A. Well, in this way: In locomotor ataxia the nerve endings in the palm of the hand and in the sole of the foot die. The result of it is they haven't the sense of touch that they have otherwise, and when they walk the locomotor ataxia swings his leg like that.
>
> Mr. Marley: If the court please, I don't believe there is a question of locomotor ataxia in this case at all, so far as the evidence is concerned so far, and I object to going into it.
>
> Mr. Wickersham: If you are not making any claim about blood tests, blood conditions of this woman, I will withdraw the question.
>
> Mr. Marley: I am saying now there was nothing said about locomotor ataxia, and he is going into something that isn't within the range of the testimony as developed at this time; and we object to it as incompetent; too remote.
>
> The Court: Objection sustained.
>
> Mr. Wickersham: The idea was, your honor, that this evidence about the blood test—I wanted to go into it if there is any question about it. That is all. You may examine." (R. 192.)

It needs no argument to show that there is no claim here that Mrs. Johnson had the syphilis.

Certain X-ray pictures were offered in evidence and defendant's attorney made the following objection thereto:

> "Now, if your Honor please, we object to them being introduced in evidence, because they are taken too remotely from the time of the accident. The evidence has developed that Myrtle Johnson had several different doctors and several different kinds of treatment. Now, unless they show that nothing intervened to change the condition of her brain, or by virtue of the treatments given to her by the various doctors, that would be incompetent, because it would embody any mistakes they made in the diagnosis of her case, and we object as incompetent for any reason." (R. 205.)

It is argued that by making this objection defendant's attorney was "still hammering at 'syphilis' before the jury." One of plaintiffs' attorneys in his argument to jury stated that her doctor made a mistake which resulted in arsenical poisoning and that because thereof Myrtle Johnson suffered "the agonies of the damned in St. Margaret's hospital, where she had a rash from her head to her heals, where she lost all her hair" as the result of the mistake of the doctor. (R. 416.) For defendant's attorney to suggest that such treatment might have changed the condition of the brain or might call for a showing that such was not a fact was not improper and was not "still hammering at 'syphilis' before the jury."

Plaintiffs' next citation from the record is the cross examination of Myrtle Johnson. She testified that Dr. Geraughty injected "some kind of serum" into the muscle of her arm. The following then took place:

> "Mr. Marley: And did he tell you what it was? A. No, he just told me that he knew he could do me a lot of good. Q. Didn't he call it salvarsan? A. No. Q. He didn't? A. No. Q. Didn't he tell you that it was an arsenical treatment? A. No." (R. 282.)

Thereafter she testified that while this treatment was being given, her face, arms and hands "broke out and swelled up"; that her eyes were almost closed and she was in "a

terrible fix" (R. 283) and that Dr. Miller (R. 283) and Dr. Krall (R. 284) diagnosed it as arsenical poisoning. It is said that defendant here tried to get Mrs. Johnson to admit that the serum was "salvarsan." We submit the examination shows no such effort and shows no attempt to prove that she had syphilis. If anything it shows the contrary.

Mrs. Johnson was asked if Dr. Krall told her that the medicine which he gave her, after she consulted him about the arsenical poisoning, contained bismuth. (R. 285.) The significance of this question so far as the charge of syphilis is concerned, is not pointed out by the plaintiffs. It suggests nothing to the lay mind. She was asked if Dr. Hines or Dr. Miller gave her any hypodermic injections (R. 286) and that question is cited to show that the defense was syphilis. The giving of hypodermic injections is not confined to those suffering this disease.

The cross examination of Dr. Geraughty furnishes the next ground upon which plaintiffs base their charge that the defense was syphilis. In the direct examination of this witness, plaintiffs' attorney asked the witness if he had obtained any history from Myrtle Johnson of any blood tests (R. 317) and if he was advised whether or not she had had a Wassermann test. (R. 317, 319.) This witness on direct examination testified that he examined her throat, skin, reflexes and glands. (R. 319.)* He was asked what a Wassermann test is used for and answered that the purpose was to discover syphilis in the blood. (R. 320.) He said that he wanted to be real sure that she did not have syphilis and therefore subjected this patient to a medical test of arsenic, iodides and mercury. (R. 320.) He explained this test to the jury and stated that it showed no evidence of syphilis. (R. 321.) He was asked if he discovered any evidence of neurosyphilis and to define that term. (R. 321.) He was

*Doctor Sanders had testified when examined by the plaintiffs' attorneys that symptoms of syphilis might be found in these. (R. 190, 191.)

asked about the Argyll Robertson pupil, skin symptoms, throat symptoms, bone symptoms, knee reflexes, patella reflexes, enlarged glands and the arsenic, mercury, and iodide treatments (R. 322); and was asked to explain each of these in relation to syphilis and whether he found any of such symptoms in this patient. (R. 322-325.) He was asked to state whether she suffered from traumatic hemiplegia or syphilis. (R. 324.) He was asked about the skull, its membranes—diploe, dura mater and pia mater, and the effect of a blow upon the left side of the head—whether there might not be a lesion of the tissue without a fracture of the bones. (R. 327.) When an objection to some of this testimony was made by defendant's attorney and overruled by the Court, Plaintiffs' attorney said: "But this is enlightening to the jury." (R. 328.) On cross examination he was asked about some of the matters concerning which he had testified on direct examination, such as the treatment which he had given Mrs. Johnson and its purpose (R. 329-330) blood and serum tests (R. 331), lesions of the brain tissues and the membranes in the skull (R. 332). In their argument counsel state that the defendant by this cross examination was claiming that Mrs. Johnson had syphilis in the secondary stage. The cross examination was but a continuation of the direct examination, except that no effort was made to associate the testimony with Mrs. Johnson's condition and no claim or contention was made that Mrs. Johnson suffered from syphilis in any stage.

Dr. Hines testifying for the plaintiffs, on direct examination stated that he treated her for arsenical poisoning and was asked if he saw any evidence of syphilis (R. 337). On cross examination he was asked whether she had told him that she had had a Wassermann test and that it showed positive (R. 338). Plaintiffs' witness, Dr. Miller, was asked on direct examination if he saw any evidence of syphilis (R. 339) and on cross examination was asked whether he made any examination as to her blood condition (R. 339). Plaintiffs'

witness, Dr. Krall, was asked on direct examination whether he made any blood tests, whether he observed any evidence of syphilis or neurosyphilis (R. 354) and on cross examination was asked whether he asked her if a Wassermann test had been taken and if she told him it was positive (R. 356). He was also asked what treatment he gave her and whether or not he gave her bismuth (R. 357). This cross examination of these doctors is said to be "an effort to prove syphilis" and "directing the jury's attention to syphilis." There is no evidence of any such effort and since the plaintiffs in each instance introduced the subject on direct examination, they have no grounds upon which to base a claim that the jury's attention was directed to this subject by the defendant.

We submit therefore that there is no "defense of syphilis" in defendant's pleadings, its opening statement, its evidence or its argument to the jury; that the record shows that the subject was introduced by plaintiffs' attorneys on direct examination of their own witnesses; that defendant's cross examination contains no such defense; and that the Circuit Court of Appeals was right when it said:

> "We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character cannot ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination." (Rec. 472.)

II.

The argument when objected to required a prompt rebuke from the trial Court. Failure to so do was an abuse of discretion.

Cases are cited to the effect that the control of argument is largely within the discretion of the trial Court. These cases, however, do not present facts and circumstances similar to those involved in the instant cases. If control of the objectionable arguments made in these cases was a matter of discretion for the trial Court, the action or inaction of the court was an abuse of such discretionary power requiring interference by this Court. The authorities heretofore cited, support this statement. In *Jackman* v. *St. Louis & H. Ry. Co.*, 200 Mo. App. 368, 206 S. W. 244, 246, the court said:

> "It is always improper for counsel to undertake in argument, to influence the action of the jury by asserting, as facts, matters which do not appear in evidence, as our courts have repeatedly held. Statements of this character are particularly objectionable when the obvious purpose thereof is to arouse passion or prejudice in the minds of the jury, or to create a feeling of resentment against or aversion to the opposing party. Much latitude may properly be allowed counsel in stating, in argument, their conclusions or deductions from the evidence; and frequently improprieties in argument, occurring perhaps inadvertently, in the heat of the trial, are not, in any event, of such character as to constitute ground for reversal; and much may be left to the sound discretion of the trial Court in respect to such matters. But where, as here, the effect of such extraneous matter, thus injected into the trial, could only serve to warp the judgment of the jury upon the facts, and make it probable that the scales of justice will be turned by creating an unwarranted feeling of hostility or resentment toward one party litigant, nothing else than prompt and vigorous action on the part of the trial Court, appropriate to the occasion, will suffice to guard against a

miscarriage of justice, if, indeed, this can always be effectual for such purpose. It is unnecessary to collate the many authorities to which we might refer in this connection; but see *Bishop* v. *Hunt*, 24 Mo. App. 373; *Beck* v. *Railroad*, 129 Mo. App. 7, 108 S. W. 132; *Blyston-Spencer* v. *Railroad*, 152 Mo. App. 119, loc. cit. 142, 132 S. W. 1175; *Levels* v. *Railway Co.*, 196 Mo. 606, 94 S. W. 275; *Neff* v. *Cameron*, 213 Mo. 350, 111 S. W. 1139, 18 L. R. A. (N. S.) 320, 127 Am. St. Rep. 606; *Buck* v. *Buck*, 267 Mo. 644, loc. cit. 660, 185 S. W. 208.

The mere admonition to counsel to 'stick to the evidence' did not, in our judgment, suffice as an antidote to the poison thus injected into the case. See *Beck* v. *Railroad, supra; Bishop* v. *Hunt, supra.* In the latter case (24 Mo. App. loc. cit. 377) it is said:

'The only proper remedy in all cases, when objection is made, is a prompt rebuke from the court, which shall be so emphatic as to strongly impress the jury with the unfairness of the procedure, and to deter them from giving the least weight to an argument so hostile to the pure administration of justice. The placid direction in general terms given by the court on this occasion (that counsel "keep to the facts of the case") was anything but a suitable preventive for the mischief to be avoided.' "

III.

The objections and exceptions of the defendant were sufficient to preserve its rights.

It is argued that the defendant did not move to discharge the jury or request any instruction to the jury on this subject. Objections were made to the argument and exceptions preserved. The objections were overruled and no further action by the defendant was necessary. In cases where an objection to improper argument is sustained, the complaining party in order to preserve his rights and be able to contend that the verdict was the result of passion and prejudice induced by such argument, must request the court to rebuke counsel or request an instruction charging the jury to dis-

regard such argument and under some circumstances request the discharge of the jury. In these cases since the objections were overruled, such further action was unnecessary and would have tended to increase the harmful effect of the argument.

In *Wilson* v. *United States*, 149 U. S. 60, where it was held that the exceptions and writ of error properly brought before this Court the improper conduct of counsel, the following appears in the statement of facts:

> "To this language of the District Attorney the counsel for the *defendant excepted*, and called the court's attention to it, and the court said: 'Yes, I suppose the counsel should not comment upon the defendant not taking the stand. While the United States court is not governed by the State's statutes, I do not know that it ought to be the subject of comments by counsel.' To which the District Attorney replied as follows: 'I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf.' To which the counsel for the defendant thereupon excepted."

The argument for defendant in error states the following:

> "The counsel for defendant below did not ask the court to give any directions or instructions to the jury in this connection, or to inform them that the omission of the defendant should not 'create any presumption against him.' They 'notified the court' of the exception, and the court said: 'Yes, I suppose the counsel should not comment upon the defendant not taking the stand * * * I do not know that it ought to be the subject of comments of counsel.'"

And Mr. Justice Field said the following:

> "This language of the District Attorney, and this action, or rather want of action, of the court, are set forth in the bill of exceptions, and although exceptions are generally taken to some ruling, or want of ruling, by the court in the progress of the trial in the admission or rejection of evidence or the interpretation of instruments, yet they can be taken to its action or want of

proper action upon any proceeding in the progress of the trial from its commencement to its conclusion, and when properly presented can be considered by the court on writ of error.

The refusal of the court to condemn the reference of the District Attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial."

In *London* v. *Bay State St. Ry. Co.*, 231 Mass. 480, 121 N. E. 394, 396, the court said:

"The plaintiff's next contention is that the defendant has not saved his rights; that if the defendant's counsel was not satisfied with the subsequent statement made by the judge it was his duty to tell the judge so and to except to his refusal to change what he then said. We are of opinion that this contention is without foundation. The defendant had in terms taken an exception to this argument of plaintiff's counsel. He also asked the judge at that time 'to have the jury instructed to disregard the statement.' *When he had taken an exception to the argument he had reserved his rights unless the judge cured the error which had been committed.* The error in the argument to which the defendant took an exception was not cured by what the judge said. His rights were saved by the exception taken." (Italics ours.)

In *Volkmor* v. *United States*, 6th C. C. A., 13 F. (2d) 594, 595, the court said:

"Admitting that these statements were wholly unjustifiable—as indeed must be done—the government contends that, as defendant failed to ask for exceptions, the error is not available. In the first place, there was no adverse ruling on the objections, and in that situation an exception was a matter of dubious propriety. But, even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel and to instruct the jury to disregard the remarks."

In *People* v. *Fielding*, 158 N. Y. 542, 53 N. E. 497, the court said:

> "Moreover, the objections taken were to the general course pursued by the district attorney, and *when the court had sanctioned this, no further objection or exception was necessary.* This method of summing up should have been sternly interrupted by the court of its own motion, so as to exclude improper statements and comments from the consideration of the jury, for objections made after the district attorney had said what he wanted to were objections made after the harm was done." (Italics ours.)